

**CONFIDENTIALITY IN MEDIATION
ACCORDING TO THE DIVISIONAL COURT OF ONTARIO, CANADA
ARTICLE PUBLISHED IN THE
INTERNATIONAL BAR ASSOCIATION
MEDIATION NEWSLETTER
SEPTEMBER 2006
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Last year I wrote an article entitled “Confidentiality in Mediation – Right or Risk”. That article examined some cases which had been decided in Ontario over the two years preceding the article. At that time I directed attention among other cases to the case of *Rudd v Trossacs Investments Inc.* In an interlocutory decision, the Judge on a motion ordered the mediator to give evidence related to the mediation despite a Mediation Agreement containing a confidentiality clause and a non-compellability clause respecting the mediator’s recollection and notes.

At that time, I was Chair of the Ontario Bar Association Section on Alternative Dispute Resolution and I and my Executive were sufficiently disturbed by the decision compelling a mediator to testify, that we took steps to have the Ontario Bar Association seek intervenor status on an appeal which was filed.

In interlocutory matters in Ontario, the rules provide for an appeal to the Divisional Court. This court is composed of three judges of the Superior Court of Justice and is for all intents and purposes a Court of Appeal. It was necessary first therefore, to seek leave for an order granting the Ontario Bar Association intervenor status and that motion was brought at the same time as the motion for leave to appeal to the Divisional Court.

Because of the importance of this issue, in the absence of statute or rule of practice at the time in Ontario, it was essential to have case law preserving the right of the parties to confidentiality in mediation. For that reason, I am setting out below the decision of Justice Howden granting leave to appeal and granting intervenor status to the Ontario Bar Association. His Honour notes that this is the first case dealing with the exception to mediation confidentiality.

"March 7, 2005

"1) On motion by Ontario Bar Association, order to go in terms of para (p.2) of Notice of Motion for leave to intervene. The O.B.A. is an organization of lawyers, law students and judges with a genuine and substantial interest in the confidentiality and exceptions to confidentiality issues raised in this proposed appeal. This organization, several hundreds of whose members are in the ADR section and all of whose members will or may be affected by the outcome of this appeal, can make a useful and distinct contribution.

"2) As to the Motion for Leave to Appeal, I find that the decision of Lederman J. conflicts in the principles not applied where a confidentiality agreement is in effect and in the reasoning process and

conclusions in *Porter v. Porter* (1983), 40 O.R. (2d) 417 (U.F.C.); *Davidson v. Richman*, [2003] O.J. No. 519 (S.C.J.); *Bard v. Longevity Acrylics Inc.*, [2002] O.J. No. 1373 (S.C.J.) and *Pearson v. Pearson*, [1992] Y.J. No. 106 (S.C.Y. Terr.). The principle applied by Lederman J. derives from the "without prejudice" rule and not from the strict analysis required by Wigmore's 4 fundamental conditions for confidentiality privilege, despite the sessions of mandatory mediation being subject to the confidentiality agreement.

"It is desirable that leave be granted because any added exceptions to the confidentiality principle in mediation will arise again, and as compelling testimony by order is per se an interlocutory matter there is no other way for the issue to be determined.

"In addition, I find that subrule (b) of 62.04 is also met. I do not necessarily believe that the decision in question is wrong but I have doubt in its correctness because it requires a mediator to in effect cast a tie-breaking vote in a case where he wrote the agreement during the latter stages of the mediation session with input from counsel. (See O.V. Gray, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 *Osgoode Hall L.J.* 667; G. Adams, *Mediating Justice* (2003) pp. 299-300.)

"The public importance of this (as the first decision re: exception to mediation confidentiality known to counsel who appeared before me) issue in respect of the expectation and significance of confidentiality in mandatory mediation is, I think, self evident.

"As to Mr. Pitch's undertaking not to question the mediator beyond one question - was Kaiser a party to the agreement - the order appears to allow more and whoever "loses" when the mediator answers, will have to insist on the full extent of the order.

"Beyond these findings, where counsel and a legally trained mediator draw an agreement and it is signed by or on behalf of all parties, and that was easily determinable at the session, it seems to detract from the court's role to bring finality to disputes to go any further than the agreement itself, on which motion for judgment can be brought without further parol evidence. For any claim arising from the signing of the mediation agreement, there is errors and omissions coverage.

"Apart from the final comment above, for the foregoing reasons leave to appeal is granted as asked. Costs are reserved to the hearing of the appeal. Time to appeal is extended to March 31, 2005 on consent."

"[signature of judge]"

"(Howden, J.)"

The appeal was heard in December 2005 before a panel of three judges of the Divisional Court. The decision was reserved and ultimately released on March 9, 2006. This decision is very important because it is now the law of Ontario. The case has not been appealed to the Ontario Court of Appeal. The decision of the court was unanimous. Further the decision of the court was thoroughly reasoned and made reference to four principles from Wigmore on evidence which are generally known as the Wigmore rules with respect to privileged communications. These rules were set out in the case of *Slavutych v Baker* which is a decision of the Supreme Court of Canada in 1975. These rules were very important to the decision made in the Divisional Court. The decision sets out the four rules clearly and then analyzes them in a very systematic fashion. The analysis of the fourth principle is particularly compelling.

Because of the importance of this decision, I am setting out the reasons in their entirety.

COURT FILE NO.: 544/04

DATE: 20060309

**ONTARIO
SUPERIOR COURT OF JUSTICE**

DIVISIONAL COURT

THEN, CARNWATH AND SWINTON JJ.

B E T W E E N:)

MARTIN RUDD, JACK SCHWARTZ,)
LOYS LIGATE, GORDON SAWA,)
WILLIAM CRYSDALE, VIOLET)
DICECCO, SAM KOTZER, PETER)
EDWARDS and IAN C. GRAYSON)

*Harvin D. Pitch and Matthew Sokolsky, for
the Plaintiffs (Respondents)*

Plaintiffs (Respondents))

- and -)

TROSSACS INVESTMENTS INC.,)
FANLON SERVICES INC., TROSSACS)
ASSOCIATES, KAIMOR MANAGEMENT)
LTD., TROSSA HOLDINGS INC.,)
TANGUERAY COMPUTERS INC.,)
STACEY MITCHELL, MORRIS KAISER,)
SHLOMO SHARON, DAVID SUGARMAN,)

HATTIN, MOSES, SUGARMAN &) *Paul Dollak*, for the Defendants
 COMPANY and 645262 ONTARIO) (Appellants)
 LIMITED)
 Defendants (Appellants))
)

- and -

ONTARIO BAR ASSOCIATION

Intervenor *Ian D. Kirby*, for the Intervenor

) **HEARD at Toronto:** December 8, 2005

SWINTON J.:

[1] This appeal raises the important issue whether a mediator who conducted a mediation pursuant to rule 24.1 of the *Rules of Civil Procedure* can be compelled to give evidence as to events which took place during the course of such mediation.

Background Facts

[2] The Appellants (Trossacs Investments Inc., Fanlon Services Inc., Trossacs Associates, Kaimor Management Limited, Trossa Holdings Inc., Morris Kaiser and 645262 Ontario Limited) are defendants in this action.

[3] The Respondents (Martin Rudd, Gordon Sawa, William Crysedale, Violet DiCecco and Peter Edwards) were investors in a limited partnership. They were represented by counsel Garth Low in this action, in which they sued the general partner and various related or associated companies and their principal Morris Kaiser, as well as the investors' accountants.

[4] In 2003, Morris Kaiser brought a motion for summary judgment to dismiss all the claims against him personally. The motion was not opposed when brought before Himel J., and on September 23, 2004, she dismissed the action against Mr. Kaiser and ordered the plaintiffs to pay him costs of over \$39,000.

[5] After receiving correspondence from Mr. Low suggesting that she had made a clerical error in calculating costs, Himel J. invited further submissions. While she considered those submissions, the litigation continued between the other parties.

[6] The parties commenced mandatory mediation on January 12, 2004 and continued on January 28, 2004. A mediation agreement was executed prior to the start of the mediation. It contained a confidentiality clause in the following terms:

2. Confidentiality

The parties agree that all communications and documents shared, which are not otherwise discoverable, shall be without prejudice and shall be kept confidential as against the outside world, and shall not be used in discovery, cross examination, at trial, in this or any other proceeding, or in any other way.

The mediator's notes and recollections cannot be soepenaed (*sic*) in this or any other proceeding.

[7] Mr. Kaiser was present at the first mediation session. The Appellants claim that he was there in his capacity as an officer, director, or signing officer of the remaining defendants.

[8] A settlement was reached on January 28, 2004, a date on which Mr. Kaiser was in attendance by telephone. The terms of the settlement were drafted by the mediator with input from counsel. The terms are set out in Minutes of Settlement that are largely handwritten. However, they are headed by the typed style of cause of the action, cut from another document and attached to the Minutes of Settlement. Mr. Kaiser's name is included, as he is one of the named defendants in the action.

[9] The terms of the settlement are handwritten and state:

The Plaintiffs William Crysdale, Peter Edwards, Martin Rudd & Gordon Sawa (the "Plaintiffs") and the Defendants signing below agree to settle the within action and counterclaim on the following terms:

- 1.) Each of the Plaintiffs shall pay to the Defendants the amount of \$32,000.00 all inclusive of all claims, interest, costs, GST & disbursements payable to Paul Dollak in trust.
- 2.) The Plaintiffs & the Defendants shall execute mutual releases in a form satisfactory to counsel.
- 3.) The action & counterclaim respecting the Plaintiffs herein shall be dismissed without costs.

This was dated January 28, 2004, and the names of the plaintiffs were written in, and they

signed.

[10] The names of the following defendants were in typed form, cut from another document by counsel for the defendants, Mr. Dollak, and inserted: Trossacs Investments Inc., Fanlon Services Inc., Trossacs Associates, Kaimor Management Ltd., Trossa Holdings Inc. and 645262 Ontario Limited. Mr. Dollak then signed as counsel on their behalf. Mr. Kaiser's name is not included among the signatories.

[11] A "Settlement and Mutual Release" was executed separately by each of Mr. Low's clients, including Ms. DiCecco. For example, Mr. Rudd signed on February 12, 2004, while Mr. Crysedale signed on February 16, 2004. Both signatures were witnessed by Mr. Low. The parties of the second part were the defendants named in the Minutes of Settlement. Mr. Kaiser's name does not appear, although he signed each Settlement and Mutual Release on behalf of the named defendants.

[12] An order was obtained from the Superior Court of Justice dismissing the action against these same named defendants on February 19, 2004.

[13] On March 5, 2004, Himel J. released her amended costs order from the summary judgment motion. In it, she reduced the costs payable to Mr. Kaiser to just over \$21,000.

[14] When counsel for Mr. Kaiser sought to enforce the revised costs order, Mr. Low alleged that he had made a mistake and never noticed that Mr. Kaiser had not signed the settlement documents in his personal capacity. Mr. Low then brought a motion seeking an order to compel the mediator to testify about communications at the mediation, for rectification of the Minutes of Settlement and for enforcement of the settlement.

[15] The motions judge, Lederman J., gave his decision on July 8, 2004, ordering that the mediator could be examined as a witness on the pending motion. At para. 23 of his reasons, he stated:

Accordingly, an order will go permitting the examination of the mediator as a witness on the pending motion with the questions being limited to his knowledge and understanding, if any, as to whether Kaiser was or was not a party to the settlement agreement that was arrived at in the mediation.

[16] The motions judge discussed the common law principle that settlement discussions are privileged. He also made reference to the parties' confidentiality agreement. He then went on to say that once a settlement has been reached and its interpretation is in question, it may be necessary to disclose mediation discussions to ensure substantive justice. However, he stated that privilege and confidentiality should not be lightly disturbed and continued at paras. 20 to 22:

Some evidence must be adduced on the motion to demonstrate that the mediator's evidence is likely to be probative to the issue and that the benefit to be gained by the disclosure for the correct disposal of the litigation will be greater than any injury to the mediation process by the disclosure of discussions that took place.

In the instant case, there is evidence that the mediator himself drafted the minutes of settlement in his own handwriting with input from counsel and, therefore, is in a position to provide important information as to whether the minutes of settlement as executed are inconsistent with any prior oral agreement of settlement among the parties.

If, indeed, the omission of Kaiser's name from the minutes of settlement was mere inadvertence, as the plaintiffs contend, it would be of benefit to the court to have the evidence of the mediator on this issue in order to prevent a possible miscarriage of justice. Any impairment to the mediation process would be minimal in this case.

[17] Leave to appeal this decision was granted by Howden J. on March 7, 2005. He also made an order granting intervenor status to the Ontario Bar Association.

The Issues

[18] The Appellants argued that the motions judge erred by dealing only with settlement privilege and failing to consider whether there is a general mediation privilege or a privilege protecting mediators from testifying based on the *Wigmore* principles. In addition, they argued that the confidentiality agreement between the parties bars the testimony of the mediator. Finally, they argued that the evidence was neither relevant nor admissible, because of the parol evidence rule and because a settlement at mediation is enforceable only if in writing.

[19] The Intervenor supported the Appellants' position that discussions with the mediator are privileged at common law, and the motions judge was in error in ordering the mediator to testify.

[20] The Respondents took the position that the motions judge correctly concluded that the mediator's evidence was necessary to prevent a miscarriage of justice.

Analysis

[21] Rule 24.1 of the *Rules of Civil Procedure* deals with mandatory mediation in civil matters. The purpose of the rule is set out in rule 24.1.01:

This Rule provides for mandatory mediation in case managed actions, in order to reduce the cost and delay in litigation and facilitate the early and fair resolution of disputes.

The nature of mediation is described in rule 24.1.02 as a situation in which "a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable solution."

[22] Rule 24.1.14 of the *Rules of Civil Procedure* states that all communications at a

mediation session and the mediator's notes and records are deemed to be without prejudice settlement discussions. In *Rogacki v. Belz* [2003 CanLII 12584 \(ON C.A.\)](#), (2003), 67 O.R. (3d) 330 (C.A.), Borins J.A. (Armstrong J.A. concurring) concluded that the rule codified the common law principle that communications made in an attempt to settle a dispute are inadmissible in evidence "unless they result in a concluded resolution of the dispute" (at para. 18).

[23] The issue in that case was the availability of a contempt order against a party who had published the content of confidential discussions during mediation. The Court of Appeal held that such an order was not available.

[24] The motions judge interpreted the words of Borins J.A. to mean that mediation privilege is not absolute. He then went on to say that if settlement discussions result in an agreement, communications are admissible evidence if the existence or interpretation of the agreement is in issue (at para. 14).

[25] The Court of Appeal in *Rogacki* did not deal exhaustively with the issue of privilege for communications in mediation, as the issue before it was the availability of a contempt order. While the majority discussed rule 24.1.14, they never addressed the common law principles relating to privilege.

[26] Common law principles have recognized a privilege for confidential communications in certain important societal relationships. In *Slavutych v. Baker* (1975), 55 D.L.R. (3d) 224, the Supreme Court of Canada held that the four conditions from *Wigmore on Evidence* should be applied to determine whether communications are privileged (at 228):

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
- (3) The relationship must be one which, in the opinion, of the community ought to be "sedulously fostered".
- (4) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

[27] In *Slavutych*, the Court held that a document submitted in a university tenure process was privileged - in part because the document was labelled "confidential", and in part because of the importance of confidentiality in the tenure process, where individuals are asked to give their frank opinion of colleagues.

[28] In *M.(A.) v. Ryan* [1997 CanLII 403 \(S.C.C.\)](#), (1997), 143 D.L.R. (4th) 1 (S.C.C.), the Supreme Court reaffirmed the approach in *Slavutych*, making it clear that privilege is to be determined on a case by case basis (at para. 20). In addition, McLachlin C.J.C.,

writing for the majority, stated that there could be circumstances of partial privilege (at para. 37):

My conclusion is that it is open to a judge to conclude that psychiatrist-patient records are privileged in certain circumstances. Once the first three requirements are met and a compelling *prima facie* case for protection is established, the focus will be on the balancing under the fourth head. A document relevant to a defence or claim may be required to be disclosed, notwithstanding the high interest of the plaintiff in keeping it confidential. On the other hand, documents of questionable relevance or which contain information available from other sources may be declared privileged. The result depends on the balance of the competing interests of disclosure and privacy in each case.

[29] A number of courts have applied the Wigmore conditions to determine whether communications during mediation are privileged: *Porter v. Porter* (1983), 40 O.R. (2d) 417 (U.F.C.C.) at 421; *Sinclair v. Roy* [reflex](#), (1985), 20 D.L.R. (4th) 748 (B.C.S.C.) at p. 755; *Pearson v. Pearson*, [1992] Y.J. No. 106 (S.C.Y.T.) at p. 2 (Quicklaw); *Sambasivam v. Sambasivam* [reflex](#), (1988), 73 Sask. R. 230 (C.A.) at p.231; *A.H. v. J.T.H.*, [2005] B.C.J. No. 321 (B.C.S.C.) at paras. 31-33). The communications at mediation have been held to be privileged unless there were overarching interests in disclosure – for example, to protect children at risk from criminal activity (*Pearson, supra*).

[30] In this case, the motions judge failed to conduct an analysis based on the Wigmore conditions. Instead, he focussed solely on without prejudice settlement privilege. In so doing, he erred.

[31] In this case, it is clear that the communications to the mediator originated in confidence and, therefore, the first Wigmore condition has been satisfied. The parties to this mediation signed a confidentiality agreement, which expressly stated that the communications at the mediation were to be confidential. More importantly, the parties agreed that the mediator’s notes and recollections could not be subpoenaed in this litigation.

[32] The second condition requires a determination that confidentiality of communications during the mediation is essential to the functioning of the mediation process in which the parties were engaged. In order for mediation to succeed, parties must be assured of confidentiality, so that discussions can be free and frank. The following quotation from Owen V. Gray provides a useful summary of the reasons that confidentiality is vital to the operation of the mediation process (from “Protecting the Confidentiality of Communications in Mediation” (1998), 36 Osgoode Hall L.J. 667 at 671):

The mediator encourages the parties to be candid with the mediator and each other, not just about their willingness to compromise, but also and especially about the needs and interests that underlie their positions. As those needs and

interests surface, the possibility of finding a satisfactory resolution increases. The parties will be wary and guarded in their communications if they think that the information they reveal may later be used outside of the mediation process to their possible disadvantage. When they have resorted to mediation in an attempt to settle pending or threatened litigation, they will be particularly alert to the possibility that information they reveal to others in mediation may later be used against them by those others in that, or other, litigation. The parties may also be concerned that their communications might be used by other adversaries or potential adversaries, including public authorities, in other present or future conflicts. The possibility of prejudice to legal rights, or of exposure to legal liability or prosecution, may not be a party's only concern. Parties may also be concerned that disclosure of information they reveal in the mediation process may prejudice them in commercial dealings or embarrass them in their personal lives. Accordingly, mediation works best if the parties are assured that their discussions with each other and with the mediator will be kept confidential.

[33] The third Wigmore condition requires a determination whether the relationship in which the communication is given is one which should be "sedulously fostered". The *Rules of Civil Procedure* require mandatory mediation of many civil disputes in order to assist the parties in arriving at settlement and thus reduce the costs of litigation. There is clearly a significant public interest in protecting the confidentiality of discussions at mediation in order to make the process as effective as possible.

[34] That brings me to the fourth stage of the Wigmore test, where it is necessary to balance the public interest in disclosure against the interest in preserving the confidentiality of communications during the mediation process. In this case, the Respondents seek to examine the mediator as a witness on a pending motion in which they seek rectification of the written settlement agreement. The remedy of rectification rests on proof of a common intention to agree to terms different from those in the signed document (Stephen Waddams, *The Law of Contract*, 5th ed. (Aurora: Canada Law Book Ltd., 2005) at pp. 232-4). While evidence relevant to the issue of mistake and the parties' intention is available from the parties themselves, the mediator is being asked to give evidence as, in effect, a tiebreaker.

[35] The motions judge was of the view that the disclosure of the settlement discussions would not undermine the mediation process, since the disclosure is "sought not as an admission against a party's interest, but solely for the purpose of determining the specific terms of an agreement that both parties have arrived at" (at para. 19).

[36] It is true that the mediator's evidence might be of some assistance in determining the terms of the settlement. However, it is not the only evidence available on the scope of the parties' agreement. Both the parties and their counsel can give evidence of what the agreement was. Indeed, it is the intention of the parties that is key to the resolution of the motion for rectification.

[37] Weighing against disclosure is the fact that the parties entered into a

confidentiality agreement in which they agreed not to make the mediator a witness. This is not a case where the parties, by their confidentiality agreement, seek to block a third party's access to information that is important for the resolution of a case. Here, the parties agreed on the rules for the mediation, which included confidentiality and non-compellability of the mediator. Absent an overriding public interest in disclosure, their agreement should be respected.

[38] The motions judge concluded that the potential harm from disclosure was minimal because the parties had reached a settlement. In doing so, he assumed that the reason for the privilege was to protect parties from disclosure of admissions against interest during the mediation process. However, as set out in the earlier quotation from Mr. Gray's article, confidentiality is important not only because parties may make admissions against interest. Parties may also reveal information to a mediator which they wish to keep confidential even after a settlement is reached, perhaps because the information is private, or because it may injure a relationship with others.

[39] The ability of parties to engage in full and frank disclosure is fundamental to the mediation process and to the likelihood that it will lead to resolution of a dispute. There is a danger that they will be less candid if the parties are not assured that their discussions will remain confidential, absent overarching considerations such as the revelation of criminal activity.

[40] Moreover, there is a danger that a mediator will lose the appearance of neutrality if required to testify in proceedings between the parties. In her concurring judgment in *Rogacki, supra*, at para. 37, Abella J.A. discussed the importance of confidentiality, quoting from Jonnette Watson Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999), 24 *Queen's L.J.* 561 at 574:

In any process forced upon parties, they must have confidence in the integrity of the process and those who have a major role in it. One of the results of requiring mediators to testify or produce documents may be a perception that the mediator, the program or the process itself does not keep confidences. While such a perception might normally cause parties to avoid mediation, they cannot do so where it is mandatory. They might, however, treat mediation as a mere formality.

[41] The motions judge found that any impairment to the mediation process would be minimal since the mediator would only be asked about the terms of the agreement. However, it is unlikely that the questions to the mediator could be restricted to a narrow question of who the parties were meant to be in the Minutes of Settlement. Indeed, it is likely that the questions to the mediator would open up discussion of the course of negotiations in order to determine the scope of Mr. Kaiser's role.

[42] The fourth condition of the Wigmore test requires a balancing of the public interest in disclosure against the public interest in preserving the confidentiality of the

relationship at issue. In this case, there is an important public interest in maintaining the confidentiality of the mediation process that, in all the circumstances of this case, outweighs the interest in compelling the evidence of the mediator.

Conclusion

[43] The appeal is allowed, and the order of the motions judge is set aside. If the parties cannot agree on costs of the appeal and leave to appeal motion, the Appellants may make written submissions within 21 days of the release of this decision, with the Respondents making submissions within 14 days thereafter.

[44] At the end of the hearing, the Intervenor indicated that it would not be seeking costs and asked that costs not be awarded against it. Given the assistance provided to the Court by the Intervenor, no costs are awarded against it.

Released: March 9, 2006

The court leaves no doubt as to the importance of confidentiality in the mediation process. Subject to matters such as fraud or other criminal situations, it is clear that the court emphasizes that confidentiality is necessary in order for mediation to be successful.

It is worth noting that this was a case where the mediator drafted the Minutes of Settlement and I think that after reading this case, everyone would agree that it is best to leave the drafting of Minutes of Settlement to counsel. The mediator may review the Minutes of Settlement and make some suggestions, but should never be the draftsman. Equally, it is important to have a Mediation Agreement between the parties which includes a confidentiality clause. There was nothing wrong with the clause in this case; it was just that the first judge did not consider it as important as the public interest in substantive justice. Clearly, the court on appeal disagreed.

For jurisdictions which have no statute and no rules governing confidentiality in mediation, it will be necessary to look to the case law. In an area as relatively new as mediation is, there is likely to be little case law available. For those jurisdictions particularly, it was thought to be worthwhile to reprint the body of the decision in this important case in Canadian jurisprudence.

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